

UNITED STATES
v.
J. R. OSBORNE ET AL.

A-31030

Decided May 26, 1970

Mining Claims: Discovery: Marketability—Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Contests—Mining Claims: Determination of Validity

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a prima facie showing that there has not been a discovery, the burden of proof is upon the contestees to show by a preponderance of the evidence that a discovery has been made.

Mining Claims: Discovery: Marketability—Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

Mining Claims: Discovery: Marketability

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make that showing the claim is properly declared null and void.

Mining Claims: Contests

The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. R. Osborne and others have appealed from a decision dated July 11, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner dated August 3, 1965, declaring the Bradford No. 4 placer mining claim (hereinafter referred to as the No. 4 claim) invalid for the reason that the charges listed in a contest complaint against the claim were sustained by the evidence presented at the hearing.¹ The charges were:

1. Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

2. No discovery of valuable minerals has been made within the limits of the claim because the mineral material present cannot be marketed at a profit and it has not been shown that there existed an actual market for these materials prior to July 23, 1955—Public Law 167 (69 Stat. 367; 30 U.S.C., 1958 ed., sec. 601).

The No. 4 claim is in the Las Vegas Valley in Clark County, Nevada. It is 12½ air miles south of the center of the City of Las Vegas, Nevada

¹ Named as contestees in the complaint were: "J. R. Osborne, Agent for: R. B. Borders, Phyllis M. Borders, F. H. Rushton, A. F. Mauer, J. R. Osborne, L. D. Holberg, Everett Foster."

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(1964 Tr. 23).² The claim covers the SW $\frac{1}{4}$ sec. 32, T. 22 S., R. 61 E., M.D.M. (Ex. 6). It is composed almost exclusively of a common variety type of sand and gravel (1964 Tr. 41), as is the rest of section 32 (1964 Tr. 100), the area surrounding section 32 (1954 Tr. 71), and the Las Vegas Valley generally (1954 Tr. 49, 70). At the present time Interstate Highway No. 15 (which runs into the center of Las Vegas) runs north-south along the east boundary of the claim; a paved road, called the Industrial Road runs north-south through approximately the center of the east half of the claim; and a network of dirt roads covers the claim (Ex. 7).

The No. 4 claim was located on June 25, 1952, and three related claims, the Bradford Nos. 1, 2, and 3 placer claims (hereinafter referred to as the Nos. 1, 2, and 3 claims) were located on June 23, 1952. The four claims covered all of section 32. The No. 1 covered the NE $\frac{1}{4}$, the No. 2 the SE $\frac{1}{4}$ and the No. 3 the NW $\frac{1}{4}$. Each of the claims was located by eight claimants. Four persons, R. B. Borders, Phyllis M. Borders, Richard R. Strawn ("R. R. Strawn" on the No. 4 location notice)³ and J. R. Osborne were common locators of each of the four claims. The Nos. 1, 2, and 3 claims were also located for the common type sand and gravel which is just like that on the No. 4 claim (1964 Tr. 100). Highway No. 91 runs north-south along the east boundary of the Nos. 1 and 2 claims. This highway, which was constructed prior to 1953 (1964 Tr. 91-92), runs into the center of Las Vegas (Ex. A, 7).

On June 10, 1953, a contest complaint was filed against the No. 4 claim. The contestees duly filed an answer and requested a hearing, but subsequently, on October 4, 1954, the complaint was amended by the Government.

On April 1, 1957, the land office found that the contestees had failed to answer the charges set forth in the amended complaint and held that such failure constituted an admission of all charges and accordingly declared the No. 4 claim, as described in the amended complaint, null and void. The claimants appealed to the Director of the Bureau of Land Management, who, on August 25, 1958, for reasons not here pertinent, set aside the default decision and remanded the matter to the State Supervisor with instructions to proceed anew by issuing a new complaint. *United States v. R. B. Borders et al.*, Nevada Contest Nos. 2468, 2469.

² There are two complete transcripts in the record. Exhibit C is the complete transcript of an old hearing held in 1954 on a related contest. That case is explained *infra*. Exhibit C will hereinafter be referred to as "1954 Tr." The transcript of the hearing held on July 13, 1964, in the present case will be referred to as "1964 Tr." Exhibit references ("Ex.") are only to exhibits submitted at the 1964 hearing.

³ R. R. Strawn was not named as a contestee in the complaint. See footnote 1 *supra*.

On April 7, 1961, the complaint which initiated the present contest was filed in accordance with the remand. The contestees filed an answer denying the charges and a hearing was held on July 13, 1964. Before examining the evidence and the law applicable to this case a few words about certain related proceedings are in order.

At approximately the same time the original complaint was filed against the No. 4 claim, contests were instituted on July 10, 1953, against the Nos. 1, 2, and 3 charging that the claims were void for lack of a valid discovery and also void because the claims were nonmineral in character. Answers were filed, and a consolidated hearing was held on November 30, December 1, and December 2, 1954.

Meanwhile, in June 1954, the claimants filed an application for patent, Nevada 025248, on the four claims (Ex. E). Publication of notice of the application for patent, commencing January 26, 1955, led to the filing of an adverse claim for the parts of the Nos. 1 and 2 claims included in the $E\frac{1}{2}E\frac{1}{2}$ sec. 32. The adverse claimants instituted a suit in a State court, which, on March 8, 1959, adjudged the adverse claimants to be the owners of the $E\frac{1}{2}SE\frac{1}{4}$ sec. 32 and the claimants to be the owners of the $E\frac{1}{2}NE\frac{1}{4}$ sec. 32.

Meanwhile, on April 1, 1955, J. R. Osborne, agent for the locators, filed proof of publication of the notice of patent application, and on April 4, 1955, the claimants paid \$1,600 to the Bureau of Land Management as the statutory purchase price for the four claims.

On April 7, 1955, the hearing examiner who heard the evidence as to the Nos. 1, 2, and 3 claims rendered his decision. First, he declared the No. 3 and the $NW\frac{1}{4}$ of the No. 1 claims to be void *ab initio* upon the ground that those areas were not open to mining location at the time claimants located the claims because of, *inter alia*, outstanding oil and gas leases. This ruling was affirmed throughout all subsequent appeals and reviews. *United States v. R. B. Borders et al.*, A-27493 (May 16, 1958); *Osborne v. Hammit*, Civil No. 414, in the United States District Court for the District of Nevada, August 19, 1964. Second, he declared that the No. 2 and the remaining three-fourths of No. 1 were valid claims under the established rules governing proof of discovery of valuable nonmetallic minerals.

The hearing examiner's decision was appealed to the Director of the Bureau of Land Management who suspended review of the second part of the hearing examiner's decision pending the outcome of the adverse suit in the State court. Thereafter the Director by a decision dated July 27, 1960, reversed the second part of the hearing examiner's decision. The Director ruled that "since the sand and gravel from these claims cannot be extracted, removed and presently marketed at a

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profit, the Bradford Nos. 1 and 2 Placer Mining Claims are null and void in their entireties. The Examiner's decision is reversed and mineral patent application Nevada 025248 is rejected." *United States v. R. B. Borders, etc.*, Nevada Contest Nos. 2476, 2478.

On October 23, 1961, the Director's decision was affirmed by the Department. *United States v. R. B. Borders et al.*, A-28624 (October 23, 1961). The Department said:

The evidence upon which the Director based his finding that the claims are without validity, set forth in the Director's decision, fully supports his finding. The locators of these two claims have not met the test of showing that these minerals of wide occurrence, because of the accessibility of the deposits, *bona fides* in development, proximity to market, and the existence of a present demand for the sand and gravel can be mined, removed, and disposed of at a profit. Without such a showing on the part of the locators, it was proper for the Director to declare the claims to be null and void. *Foster v. Seaton*, 271 F. 2d 836 (1959).

On August 19, 1964, the Department's decision was affirmed by the U.S. District Court. *Osborne v. Hammit, supra*. The District Court pointed out that the findings of the hearing examiner were premised upon the false notion that the burden was on the Government to sustain the invalidity of the claims. This decision was not appealed so it and the Department's decision of May 16, 1958 (*United States v. R. B. Borders et al.*, A-27493), which also was not appealed, are the final words on the validity of the Nos. 1, 2, and 3 claims.

At the hearing on July 13, 1964, the claimants presented as evidence, *inter alia*, Exhibit C, which is the entire 327-page transcript of the hearing held in 1954 on the validity of the Nos. 1, 2, and 3 claims (1964 Tr. 67). See footnote 2, *supra*.

The facts of this case as revealed by the evidence presented by both sides are generally not disputed; the dispute is largely over the legal effect which is to result from those facts.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. *United*

States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer v. Dredge Corporation*, 398 F. 2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *Osborne v. Hammit, supra.*

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. sec. 611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *Palmer v. Dredge Corporation, supra*; *United States v. Barrows*, 404 F. 2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969).

There is no contention here that the No. 4 claim has an uncommon variety of sand and gravel and the evidence shows that it is ordinary (1964 Tr. 41-44). We therefore turn to a consideration of the evidence bearing on the marketability of the sand and gravel on the No. 4 as of July 23, 1955.

The evidence presented at the 1954 hearing (Exhibit C) showed that the material in section 32 is like that found on 100 to 175 other sections in the Las Vegas Valley (1954 Tr. 69, 84-85). The Las Vegas Valley or area is defined as the land within "roughly a radius of 15 miles from the center of Las Vegas" (1954 Tr. 51). There were 800 to 1,000 mining claims in this Las Vegas area spread over an area of 150 to 175 sections (1954 Tr. 66-67) and with 1 or 2 possible exceptions the 800 to 1,000 claims were located exclusively for sand and gravel (1954 Tr. 50). 75 percent of the Las Vegas area is estimated to be sand and gravel land (1954 Tr. 70). In short the Las Vegas area has an unlimited supply of sand and gravel of the type found in section 32 (1954 Tr. 67, 244). For example, one section of material 3 feet deep could have supplied the 1953-1954 level of demand for Las Vegas sand and gravel for approximately 3 years (1954 Tr. 80-81). Section 32 has material perhaps 15 feet deep (1964 Tr. 76). Thus at the time not more than 1 percent of the available sand and gravel in the Las Vegas area could have fully supplied the demand for all of the years in the reasonably foreseeable future (1954 Tr. 79-81).

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As of 1954, the only uses that had been made of material from the Nos. 1, 2, and 3 claims were as follows:

1. Approximately 250 yards of material were sold for use as fill in 1952 to a person constructing a trailer court and motel $2\frac{1}{2}$ miles north of section 32 (1954 Tr. 176, 184, 186, 205).

2. The State took approximately 40,000 yards of material without charge from a pit on the No. 2 claim at various times between approximately 1926 and approximately 1951 for use in resurfacing and rebuilding Highway No. 91 (1954 Tr. 177, 230).

In the years 1953 and 1954 there was apparently no production from the Nos. 1, 2, and 3 claims and the market for Las Vegas Valley sand and gravel appeared to be adequately supplied by then active claims and producers (1954 Tr. 84, 121, 293). Some of the active claims were located close to section 32 and contained deposits "practically identical" with the material found in section 32 (1954 Tr. 215-216).

Because of these facts, William L. Shafer, a Government mining engineer, testified at the 1954 hearing that, based on his inspection of the claims and his knowledge of the sand and gravel market in the area, it was his opinion that the sand and gravel on the Nos. 1, 2, and 3 could not be extracted, removed, and marketed at a profit (1954 Tr. 83-84).

There was no showing at the 1954 hearing of any real attempt by the claimants to develop the claims into a commercial enterprise. Several witnesses for the claimants merely testified that in their opinion it would be profitable to operate the claims at a profit (1954 Tr. 182, 224-225, 233-234, 285-287).

In declaring that the three claims were properly held void the U.S. District Court in *Osborne v. Hammit*, *supra*, said:

* * * If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary inasmuch as the government witness, William L. Shafer, although well qualified as a mining engineer, had few, if any qualifications in experience and knowledge to testify concerning the market for the material in the Las Vegas area, and the costs of extraction and processing. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

The mining laws of the United States are quite benificent [sic]. A prospector may occupy public lands and mine and remove materials therefrom for his personal profit by his own ex parte action, without so much as a "by-your-leave" from any person or public official. If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would, perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of *credible* evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (supra) by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

Is there anything more than "speculative, hypothetical and theoretical" evidence which would warrant a more favorable conclusion with respect to the No. 4 claim than with respect to the Nos. 1, 2, and 3 claims? We think not.

The evidence at the 1964 hearing showed that nothing had been removed from the No. 4 claim as of that date except approximately 11,607 yards of material which two construction companies had removed from a pit in the southeast corner of the claim in 1961 for use as fill in the building of Interstate 15 (1964 Tr. 44, 46-48; Ex. 7). Apparently the material was taken without charge for there were no indications that anything had ever been sold from the claims (1964 Tr. 107, 114, 121, 123). Other than for the pit left by the removal of this material the only other evidence of any working on the claims consisted of six bulldozer cuts, twenty-two back-hoe trenches (1964 Tr. 25; Ex. 7), and some dirt road work (1964 Tr. 48, Ex. 7). The material from the cuts and trenches was apparently not removed from the claim (1964 Tr. 46-48) and these diggings appeared to be the result of exploratory or assessment work and not the result of any attempt to develop the claims (1964 Tr. 116).

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The free taking of the 11,607 yards of material in 1961 would obviously not show that the material on the claim was marketable at a profit as of July 23, 1955, six years earlier. This is evident from the fact that the "market" for that material, construction of the highway, did not materialize until 1961 and was a short-lived one.

The evidence at the 1964 hearing indicated that the demand for sand and gravel in the Las Vegas area has increased between 1950 and 1963 along with the population and other growth factors of Las Vegas (1964 Tr. 84-86; Ex. D) and that the supply available has perhaps decreased somewhat (1964 Tr. 88-90, 95, 104; Ex. B). But there was no suggestion that as of July 23, 1955, or even as late as 1964, the supply did not still vastly exceed demand or that the demand was not still being fully satisfied by the then active producers and claims. In fact despite the long term increase in demand between 1950 and 1963 it would appear that the demand for sand and gravel was no more, if not less, in 1955 and 1956 than in 1954 (1964 Tr. 83).

The claimants called as witnesses George C. Monahan, the Clark County Engineer for the past 13 years (1964 Tr. 97); Pat R. Cosgrove, the manager of a ready-mix concrete plant (1964 Tr. 108); John R. Osborne, one of the claimants (1964 Tr. 113); and Lloyd G. Fields, a map maker (1964 Tr. 93).

Monahan and Osborne testified that as of July 23, 1955, and as of 1964, there was a *general* demand in the Las Vegas area for sand and gravel of the type found on and in the general area of the No. 4 claim (1964 Tr. 99, 101-103, 107, 117-118). This testimony was insufficient to show a discovery because to satisfy the present marketability test the claimants must show the existence of a demand for the material on the specific claim and not simply a general demand for the type of material in question. *United States v. Harold Ladd Pierce*, 75 I.D. 270 (1968); *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), *aff'd Foster v. Seaton, supra*; *United States v. Loyd Ramstad and Edith Ramstad*, A-30351 (September 24, 1965).

The claimants suggest by their evidence that since a large mining operation has been in existence on section 29, about 1 mile north of the No. 4 claim, sporadically since 1954 or 1955 (1964 Tr. 73, 76; Ex. L, K) and since the quality and quantity of the material in section 29 is similar to the material in section 32 (1964 Tr. 75-76), it follows that if the claimants had entered the business in 1955 (or 1964) they would have done as well. In connection with this evidence Monahan and Osborne testified that it was their opinion that the material on the claim could have been mined, removed, and marketed at a profit as of July 23, 1955 (1964 Tr. 103-104, 120), and Cosgrove and Osborne

testified that it was their opinion that this could be done at the time of the hearing (1964 Tr. 111, 120).

This is the same type of theoretical evidence which the court in *Osborne v. Hammit*, *supra*, found to be insufficient to satisfy the marketability test as to the Nos. 1, 2, and 3 claims. Thus this evidence must be rejected for the same reasons given there. See the further discussion of *Osborne v. Hammit* in *United States v. Loyd Ramstad and Edith Ramstad*, *supra*⁴, and *United States v. Keith J. Humphries*, A-30239 (April 16, 1965).

Obviously the claimants have failed to show that by reason of present demand, *bona fides* in development, proximity to market and accessibility and other factors that the deposit on the No. 4 claim was of such value that it could have been mined, removed, and disposed of at a profit as of July 23, 1955.⁵ Nevertheless, appellants argue on this appeal that the No. 4 claim should not be declared void for a number of reasons.

First they argue that the burden of proof, *i.e.* the risk of non-persuasion, as well as the burden of presenting enough evidence to make a *prima facie* case in the proceeding, was upon the contestant and that the contestant failed to prove by a preponderance of the evidence that the claims were invalid for lack of a discovery.

There is no merit to this contention, for it is well established that:

* * * when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. * * * *Foster v. Seaton*, *supra*, at 838.

⁴ We note also that the two sand and gravel claims held to be invalid in *Foster v. Seaton* were located in the E½NE¼ sec. 29 and that Monahan also testified in that case that the gravel on those claims was very good for road purposes. 65 I.D. 10-11.

⁵ Throughout this case we have referred to July 23, 1955, as the cut-off date as of which a discovery must be shown. Actually the critical date appears to be October 2, 1953, at the earliest or January 15, 1955, at the latest. On the latter date there was published a regulation which provided that a classification under the Small Tract Act, 43 U.S.C. § 682a *et seq.* (1964), would segregate the land classified from all appropriations, including locations under the mining laws (43 CFR 257.3(b), 20 F.R. 336; now 43 CFR 2233.2(b)). On the earlier date there was issued Classification Order No. 95, published on October 8, 1953. 18 F.R. 6412, which classified the land in appellants' claims for small tract disposal (Ex. 5). In *Osborne v. Hammit*, *supra*, the court held that Order No. 95 was in effect a withdrawal of land which invalidated *ab initio* any mining claim located after the classification order, including one located prior to the adoption of the regulation. See also *Dredge Corp. v. Penny*, 362 F. 2d 889 (9th Cir. 1966). Under the *Osborne* ruling appellants would have to show that the material from their claims was marketable at a profit as of October 2, 1953. At the latest the showing would have to be made as of January 15, 1955, the date of publication of the regulation spelling out the effect of a small tract classification.

We do not, however, rest our decision on appellants' failure to make the required showing as of either date since it is clear that they failed to make the showing even as of July 23, 1955.

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Appellants do not cite this case in their argument on this point, although they cite it in other contexts.

Next appellants argue that section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964) which reads

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim *hereinafter located* * * *. (emphasis added)

does not apply to these claims since the claims were "located," in the sense of being staked or posted, in 1929. Therefore they contend it is not essential to the validity of these claims that a discovery (including marketability) be shown on the claims prior to July 23, 1955. To hold that it *is* essential, they argue, is to give retrospective effect to a statute that contains no retrospective language.

As indicated earlier, the courts have ruled to the contrary. *United States v. Barrows, supra*; *Palmer v. Dredge Corp., supra* (affirming *Clear Gravel Enterprises, Inc., A-27967, A-27970* (December 29, 1959) where the issue is fully discussed).

Next appellants argue that since the Supreme Court decision in *United States v. Coleman, supra*, does not specifically mention "July 23, 1955," it is not authority for the proposition that the locator of claims containing a common variety of material must show that the material was marketable as of July 23, 1955. Moreover, appellants say that this case is authority for the proposition that such a locator need only show marketability as of the date of the contest hearing in order to validate his claim.

This argument is without merit. The Supreme Court in that case necessarily reviewed and affirmed a decision of the Secretary of the Interior (*United States v. Alfred Coleman, supra*) which stated that "the only issue in dispute at the hearing * * * was the existence of a market for profitable sales before July 23, 1955" and which held that the claims there involved were void because the mining claimant had failed to show that the common variety deposit, upon which his claim of discovery was based, could be mined, removed, and disposed of at a profit as of July 23, 1955.

Next appellants argue that it is wrong to interpret the pertinent mining statute (30 U.S.C. sec. 22 (1964)) as requiring a demonstration of present value or marketability. They contend that their claims can be sustained on the basis of prospective market value (which they contend they have shown). This argument was heard and dismissed in *Foster v. Seaton, supra*, where it was said:

Appellants' principal assignment of error is that the Secretary misinterpreted the statute by requiring a demonstration of present value. They earnestly contend that their claim can also be sustained on the basis of prospective market value.

* * * * *

* * * The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. (P. 838.)

The present marketability test has been approved by the Supreme Court in *United States v. Coleman*, *supra*. See also *Palmer v. Dredge Corporation*, *supra*, which sustained Departmental decisions holding invalid 28 sand and gravel claims lying within 5 to 8 miles west of Las Vegas for a lack of showing of marketability at a profit as of July 23, 1955.

Claimants say that there is no requirement that to validate a mining claim a claimant must prove *certainty* of profit or *certainty* of future sales or actual sales. We agree. *United States v. Harold Ladd Pierce*, *supra*, at 283 and cases cited. Then claimants say that to require a showing of present marketability as opposed to prospective marketability is to require a showing of certainty of profit or certainty of future sales or actual sales and is, therefore, wrong. Accordingly, they say it must be considered sufficient to validate a claim merely to show prospective marketability.

The short answer to this argument is that the second premise is wrong. To require a showing of present marketability is merely to require a showing that profitable sales *could* presently be made, in a practical as opposed to a theoretical sense, from the claim and is not to require certainty of sales or certainty of profit or actual sales. *United States v. Harold Ladd Pierce*, *id.*

Next claimants argue that

The Department of Interior and its Secretary are estopped from denying the validity of the Bradford No. 4 placer mining claim here at issue, as locators have duly made application for and have paid the requisite fees for the issuance of a mineral patent thereon in patent application Nevada 025248, and said application was accepted and the fees have been retained by said Department since its filing date in April of 1955.

The short answer to this contention was given by the U.S. District Court in *Osborne v. Hammit*, *supra*, in answer to the very same argument advanced as to the Bradford Nos. 1, 2, and 3. The Court said:

* * * Plaintiffs argue that the publication of the application for patent and the acceptance of the money vested equitable title in plaintiffs as against the govern-

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ment, and in effect, compelled the issuance of a patent after other formal procedural requirements had been fulfilled. This is not the law. *Adams v. United States* (9 CCA 1963, 318 F. 2d 861). *Cameron v. United States*, 252 U.S. 450. Plaintiffs acquired no vested title, either legal or equitable, to the mining claims by virtue of the ordered publication in the patent proceedings and the provisional acceptance of the purchase price.

Fundamentally, there is no inconsistency in the public land regulations between the procedure to obtain a mining patent (43 C.F.R. Part 185, subpart D), and the general regulations governing government contests (43 C.F.R. Part 221: 221.67, et seq.). * * *

Next claimants argue that the Government is estopped to use the failure of the claimants to develop the claims as a basis for saying the claim is void because the Government "barred" the claimants from developing the claims, first by bringing a contest against the claim and maintaining the litigation for so long a time and perhaps second by sending a letter to the claimants in March 1962, which stated that if the claim is invalid "your removal of sand and gravel will be considered a willful trespass and damages will be assessed accordingly." (Ex. F.)

The short answer to this argument is that neither the letter nor the issuance of the contest complaint nor the litigation proceedings in general could per se and without more in any legal or physical way prevent the claimants from developing the claim at any time they chose to do so. The first contest complaint against the claim was filed on June 10, 1953, almost one year after the location of the claim on June 25, 1952. Thus appellants had almost an entire year in which to develop the claim and establish the existence of a discovery. Even after the complaint was filed, they could have proceeded with development, although it might have been attended with some risk. But one who locates a mining claim before making a discovery must assume the risk of a challenge to the validity of his claim, for the law does not give him a period of time after location in which to make a discovery.

As for the receipt of the letter in 1962, it could in no way have affected the decision of the claimants in regard to their developing the claim as of July 23, 1955.

Finally, appellants say that even if marketability as of July 23, 1955, is a proper standard for judging the validity of these claims, they were not given adequate notice that the claims were being contested on that basis. Therefore, they argue, if the case is going to be decided on the basis of that standard then due process of law would require a reopening of the case to allow them to present proof on that issue.

At first it is difficult to see how the appellants can make such an argument in view of the fact that the complaint said, and the appellants at page 18 of their statement of reasons for this appeal admit it said, that "it has not been shown that there existed an actual market for these materials prior to July 23, 1955." Apparently appellants say they are or were confused by the word "shown." Appellants say they interpret the complaint as charging that prior to the filing of the complaint, that is, prior to July 23, 1955, the claimants did not present evidence to someone somewhere at sometime showing that the material on the claim was marketable as of or before July 23, 1955, and appellants complain that they were not given an opportunity to appear at any such pre-complaint hearing.

Obviously the complaint was never intended to have the meaning which the claimants say they attribute to it and the claim was not declared void by the hearing examiner or the Chief, Office of Appeals and Hearings, for such a reason.

It would appear that claimants were aware of the true meaning of the words just quoted from the complaint at the time of the hearing or that they were aware that the true meaning was important to the resolution of the case, for they examined (1964 Tr. 102, 103-104, 120) and cross-examined (1964 Tr. 76, 81-82) witnesses extensively in relation to it.

Under these circumstances the appellants' contention is without merit. The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint. *United States v. Harold Ladd Pierce, supra.*

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.